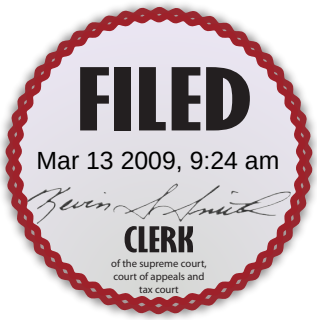

ATTORNEYS FOR APPELLANTS:

ROBERT J. PALMER
JOHN H. PEDDYCORD
May Oberfell Lorber
Mishawaka, Indiana

ATTORNEYS FOR APPELLEES:

KENNETH M. McDERMOTT
Plymouth, Indiana

PAUL T. CHOLIS
South Bend, Indiana

IN THE COURT OF APPEALS OF INDIANA

DENNIS M. HORRALL, as Successor Trustee Of the Mary Y. Skelton Revocable Living Trust, and JANUS V. HORRALL, Niece of Mary Y. Skelton,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 71A03-0802-CV-48
PHYLLIS J. MOTTS, TERESE A. COOK, and MARY ELLEN SKELTON,	)	
Appellees-Defendants.	)	

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
Cause No. 71J01-0608-TR-8

March 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Janus V. Horrall ("Janus") and her husband, Dennis M. Horrall ("Dennis"), (collectively, "the Horralls"), appeal a November 2007 probate order that invalidated two restatements, or amendments, to the revocable living trust of Mary Y. Skelton ("Yvonne"). Phyllis J. Motts ("Motts"), Terese A. Cook ("Cook"), who is Motts' daughter, and Mary Ellen Skelton ("Mary Ellen"), who is Yvonne's niece (collectively, "Appellees"), cross-appeal. We affirm and remand.

Issues

The parties present various issues, which we restate as follows:

I. Whether the probate court erred when it invalidated the January 24, 2006 Amendment to Yvonne's trust based on the presumption of undue influence, which had not been pled;

II. Whether the probate court erred by invalidating the April 7, 2006 Amendment to Yvonne's trust based on the presumption of undue influence; and

III. Whether remand to the probate court for determination of attorneys' fees is appropriate.

Facts and Procedural History

The facts most favorable to the judgment are as follows. Yvonne, who lived and worked in northern Indiana for the majority of her life, never married nor had children. By 2005, Yvonne was in her early eighties, and her health was declining. On September 21, 2005, she executed a revocable living trust to distribute what would be an estate of approximately $400,000. That trust contained various specific distributions to be made upon her death and named her friends, Motts and Edwina Bert ("Bert"), as residual beneficiaries.

App. at 28. The trust contained no provision for Janus,[1] who was Yvonne's niece, or Dennis.

On January 4, 2006, Yvonne executed an amendment to her trust that changed some specific distributions yet still included no provision for the Horralls. The following day, Yvonne was not breathing well, called Janus, and asked the Horralls to come immediately. Yvonne was transported via ambulance to St. Joseph Hospital, where she was admitted. Yvonne remained in the hospital for the next few weeks, during which time Janus made daily visits to the hospital and occasionally stayed overnight. Dennis also visited. The Horralls became Yvonne's health care representative. The Horralls also took care of Yvonne's dog while she was hospitalized.

On January 24, 2006, three significant events occurred. Yvonne was discharged from the hospital, she went to live at the Horralls' home, and she executed another amendment to her trust ("the January 24, 2006 Amendment"). This second amendment not only changed some specific distributions but also replaced Bert with Janus and made Dennis power of attorney, successor trustee of the trust, and personal representative. Thus, at that point, the residual beneficiaries were Motts and Janus rather than Motts and Bert.

For the next few weeks, the Horralls took care of Yvonne. On February 11, 2006, Yvonne returned to her own home. Thereafter, the Horralls and hospice helped Yvonne with meals, medications, cleaning, etc., and company. Throughout this period, hospice described Yvonne as forgetful, lethargic, confused, and suffering short term memory loss. At some

[1] According to Janus, Yvonne and she had been close when Janus was a young adult, and they had shared interests in science and religion. However, after Janus married and began a family, she did not see Yvonne as much. Janus indicated that they reconnected in December 2005. App. at 154-55, 161-69.

point, the Horralls' care of Yvonne was questioned. On the night of March 29, 2006, Yvonne fell. The following day, Janus arrived at Yvonne's home, where a hospice nurse and various others were already present. There, in front of Yvonne, Mary Ellen reiterated concerns about the care the Horralls were providing to Yvonne and made several accusations against them. Specifically, she accused Janus and Dennis of taking money out of Yvonne's bank account, changing her stocks, and stealing jewelry, coins, money, and other items.

On March 31, 2006, Janus, who had been very upset by the accusations, became ill. Dennis called Mary Ellen and asked that they meet at Yvonne's home so he could give her the list of Yvonne's medications, and then he would be able to care for Janus. From then on, Yvonne was cared for by Mary Ellen, Samantha Leslie (Mary Ellen's sister), Cook, hospice, and others. On April 3, 2006, Cook and Mary Ellen drove Yvonne to an attorney's office, where changes to Yvonne's trust were discussed. On April 7, 2006, the attorney visited Yvonne and brought documents (the "April 7, 2006 Amendment") that she executed, which provided a specific distribution of $10,000 to Mary Ellen, changed the residual beneficiaries from Motts and Janus to Motts and Cook, and eliminated any provision for the Horralls. Yvonne died eight days later.

Mary Ellen and Cook acted as trustees of Yvonne's trust, administered the affairs of the trust, and completed and filed the estate inheritance tax return. In August 2006, the Horralls filed a "Petition to Docket Trust and Trust Amendments, to Determine Assets of Trust, and to Set Aside Purported Restatement of the Revocable Living Trust" of Yvonne. App. at 20. In challenging the April 7, 2006 Amendment to Yvonne's trust, Janus and

Dennis alleged lack of competency as well as duress, fraud, undue influence, and/or coercion. In a November 2006 answer, Appellees denied the allegations within the Horralls' petition and filed a counterclaim against Dennis requesting an accounting of the trust assets together with an inventory. *Id*. at 43-47.

The parties exchanged and filed witness lists on April 9, 2007. On September 13, 2007, the Horralls filed a pre-trial brief outlining the facts they planned to prove, the pertinent law, and their argument. Within that brief, they requested that the court find that Yvonne was competent to execute the January 24, 2006 Amendment, incompetent to execute the April 7, 2006 Amendment, and unduly influenced into executing the latter amendment. *Id*. at 66.

A bench trial in the matter was held on September 13-15, 2007, and concluded on September 17, 2007. On October 16, 2007, Appellees filed a post-trial brief and proposed findings and conclusions, within which they relied heavily on undue influence in attacking the validity of the January 24, 2006 Amendment. The next day, the Horralls filed their proposed findings and conclusions, as well as an objection to and motion to strike the portions of Appellees' brief and proposed findings and conclusions that concerned undue influence and the January 24, 2006 Amendment. One of the Horralls' proposed conclusions cited Indiana Trial Rule 15(B), and stated:

> No express notice was given by [Appellees] that they intended to try any issue concerning undue influence as it related to the January 24, 2006 Amendment …. [The Horralls] were not on notice and did not litigate the issue of undue influence as it pertains to the January 24, 2007 [sic] trust amendment, and therefore this Court will not consider any such issue at this time.

Id. at 78. The Horralls also filed a motion to strike references to undue influence pertaining to the January 24, 2006 Amendment. On November 1, 2007, the court held a hearing on the motion to strike. Appellees orally moved to amend the pleading to conform to the evidence. The Horralls objected to Appellees' motion and requested time to receive additional evidence *if* the court was to grant Appellees' motion.

On November 26, 2007, the court issued findings of fact and conclusions thereon. *Id.* at 11-19. The conclusions follow:

> 1. During the period from January 5, 2006, until her death on April 15, 2006, Yvonne not only was progressively deteriorating physically but her mind was weak and susceptible.
>
> 2. Janus and Dennis Horrall were in a relationship with Yvonne from January 5, 2006, to February 11, 2006, which raised a presumption of trust and confidence on their part and corresponding influence on Yvonne.
>
> 3. During the period from March 31, 2006, to April 15, 2006, Mary Ellen Skelton and Terese Cook were in a relationship with Yvonne which raised a presumption of trust and confidence on their part and a corresponding influence on Yvonne.
>
> 4. The documents executed on January 24, 2006, gave rise to a presumption of undue influence.
>
> 5. The presumption of undue influence to the documents executed on January 24, 2006, was not rebutted.
>
> 6. The documents executed by Yvonne Skelton on January 24, 2006, were the product of undue influence and are thus invalid.
>
> 7. The documents executed by Yvonne Skelton on April 7, 2006, gave rise to a presumption of undue influence.
>
> 8. The presumption of undue influence as to the documents executed on April 7, 2006, was not rebutted.

> 9. The documents executed by Yvonne on April 7, 2006, were the product of undue influence and are thus invalid.
>
> 10. The documents dated January 24, 2006: First Amendment to Abstract of Trust of Yvonne, a Second Amendment to the Revocable Living Trust of Yvonne, Last Will & Testament of Yvonne, a Second Amendment to the Revocable Living Trust of Yvonne, a Last Will & Testament of Yvonne, a Durable Power of Attorney and Nomination of Conservator and Revocation of Power of Attorney and Nomination of Conservator are hereby declared invalid and are set aside.
>
> 11. The documents dated April 7, 2006: the Power of Attorney, Designation of Health Care Representative, Power of Attorney Revocation, Restatement of the Revocable Living Trust of [Yvonne] and Last Will and Testament dated April 7, 2006, are hereby declared invalid and are set aside.

Id. at 16-17.

Discussion and Decision

Standard of Review

"When a trial court enters findings of fact and conclusions of law, we apply a two-tiered standard of review: first, we determine whether the evidence supports the findings, and second, whether the findings support the judgment." *Supervised Estate of Allender v. Allender*, 833 N.E.2d 529, 533 (Ind. Ct. App. 2005), *trans. denied*. In deference to the trial judge's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. *Id*. We consider only evidence favorable to the judgment, and we do not reweigh evidence. *Id*. To demonstrate that findings are clearly erroneous, a challenger must present a record that leaves us firmly convinced that a mistake has been made. *Id.* We do not defer to conclusions of law, however, and evaluate them de novo. *Id*.

I. January 24, 2006 Amendment

The Horralls assert that the court erred in invalidating the January 24, 2006 Amendment to Yvonne's trust because the issue of undue influence, or the presumption thereof, was not pled by Appellees. They maintain that the evidence relied upon by the court was submitted by the Horralls to support their claims that Yvonne was competent on January 24, 2006, but incompetent and acting under undue influence when she executed the April 7, 2006 Amendment. Without notice that undue influence or a presumption thereof as to the January 24, 2006 Amendment was at issue, the Horralls offered no evidence to rebut such a claim. They contend that they first learned that it might be an issue when Appellees filed proposed findings and conclusions, to which the Horralls objected.

In a memorandum, which was appended to the end of the court's findings and conclusions, the court confirmed that in challenging the validity of the January 24, 2006 Amendment, Appellees pled incompetency rather than undue influence. However, the court decided that it

> must issue its decision based on the evidence presented and since the evidence pertaining to the undue influence regarding the January 24, 2006 documents was introduced by the Horralls, they cannot now object to the Court considering that portion of their evidence as it pertains to the issue of undue influence.

Id. at 17-18. In reaching its conclusion, the court quoted Indiana Trial Rule 15(B) and relied upon the following rationale as stated in *Indianapolis Transit System, Inc. v. Williams*, 148 Ind. App. 649, 658-59, 269 N.E.2d 543, 550 (1971) (emphasis added):

> Whether the issues to be tried in any law suit are formed by the pleadings or in a pretrial order, their function is merely to provide the parties and the court

> with an itinerary for the journey through the trial. *Either party may timely demand strict adherence to the pre-determined route or, if deviation is permitted, the time necessary to prepare to meet the new issue. But when the trial has ended without objection as to the course it took, the evidence then controls.* Neither pleadings, pre-trial orders, or theories postulated by either party should then operate to frustrate the trier of fact in finding the facts which that evidence (including all reasonable inferences the trier may draw therefrom) convinces him (whether he be a judge or juror), by a preponderance thereof, is true or block him from awarding the relief, if any, which the rules of substantive law say those facts merit.

Id. at 18 (also citing *Hunter v. Milhous*, 159 Ind. App. 105, 118-19, 305 N.E.2d 448, 457 (1973)).

Indiana Trial Rule 15(B) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

See also Countrymark Coop., Inc. v. Hammes, 892 N.E.2d 683, 692 (Ind. Ct. App. 2008) (stating that an amendment of pleadings to conform to the evidence presented is normally a matter within the trial's discretion), *trans. denied*.

A careful review of the transcripts[2] is necessary to address whether, prior to Appellees' proposed findings and conclusions, the issue of undue influence regarding the January 24, 2006 Amendment arose. At a March 1, 2007 pre-trial hearing, the following colloquy occurred:

> Mr. Cholis [Appellees' attorney]: Now, there are two sets of amendments that are at issue in this trial. Before you – the posture of this case is that the last amendment was made on April 7th of 2006. [The Horralls] have attacked in a filing, in essence, let's call it a will contest or a trust contest, as to the April 7th amendments, which are the last ones. He has posited in his pleadings that the previous amendment, which is dated January 24, are valid because the decedent was competent, at that time. I mean, that's the essence of his argument.
>
> *I have raised the issue in my answer denying that the January 24th amendments were valid, and I have attacked those. And I just want to make sure that the Court today, in front of opposing counsel, that not only are the April 7th amendments at issue, but, also, the January 24th amendments are at issue, that's what we are trying here.*
>
> The Court: He's in favor the January amendments, you're not. You are in favor of the April ones?
>
> [Appellees' attorney]: That is accurate.
>
> Mr. Peddycord [Horralls' attorney]: Judge, the problem with the way he did it, he didn't raise a counter-claim, I'm not being critical, I'm not saying he had to, but when he denied, *we alleged that on January 24th, 2006, the decedent executed this trust amendment and it's a valid trust amendment and he denied that. I don't care as long as I know in preparing for this trial why he says – you know, he's got a – unfortunately, I don't know the paragraph that you're denying it doesn't say why, why he denies it and if it was based on competency, I need to know that, if it's based on undue influence, I need to know that. So as long as he clarifies that for me and if we're going to have that as an issue, too* –

[2] More than one transcript was submitted on appeal. The main transcript from the trial shall be referred to as "Tr." The other, shorter transcripts memorializing certain hearings shall be referred to using the date of the hearing along with "Tr."

The Court: *Well, in reality, he can throw everything in but the kitchen sink and that is not going to tell you a whole hell of a lot here.*

[Horralls' attorney]: No, but –

The Court: I think, that again would be part of the pre-trial order when you make your claims as to the issue. Hopefully, by that time you have done your discovery and we will know what you think is the validity or non-validity of those points. But, I think, that can be part of the –

[Horralls' attorney]: Pre-trial order.

[Appellees' attorney]: Well, let me quote something here that I did say. I said, "The *Respondents, which are Teresa Cook and Mary Ellen Skelton, denied that the decedent executed a Second Amendment to her Revocable Living Trust on January 24, 2006. Said denial being based upon the contention of the Respondents that at the time of the signing of the purported Second Amendment the decedent lacks sufficient mental capacity to validly execute a document disposing of her assets due to the affects of medication administered to her and, therefore, weakened her physical condition which necessitated hospitalization … ." So, I think, it's clear what I have alleged.*

[Horralls' attorney]: *Just incapacity?*

[Appellees' attorney]: *Yes*.

[Horralls' attorney]: That's fine. I mean, that makes the trial a little more complicated, obviously, and I'm not saying he doesn't have a right to do that. I'm just saying that we actually have a trial about the validity of one trust amendment on April 7th and another on January 24th.

The Court: As I understand pre-trial orders that's the purpose of them to –

[Horralls' attorney]: Yes, to narrow down the issues.

[Appellees' attorney]: Right. Exactly.

The Court: I would agree that –

[Horralls' attorney]: Allege about anything.

[Appellees' attorney]: *Wait a minute. … When [Horralls' Attorney] says am I limiting it to incapacity in the sense that I did not allege duress or fraud or undue influence and –*

[Horralls' attorney]: *I don't care if you want to think about that and let me know by a reasonable time period.*

The Court: I think at the time of the pre-trial order[3] you better –

[Horralls' attorney]: By then, right.

[Appellees' attorney]: Right.

[Horralls' attorney]: That's all I'm saying.

The Court: *And that goes both ways.*

[Horralls' attorney]: *Right.*

[Appellees' attorney]: *Right.*

[Horralls' attorney]: We allege four things as the basis for invalidity of the April 7th – I'm going to withdraw one of my – and I need to have that in the pre-trial.

The Court: As I understand the way things work, *if indeed discovery is completed by then we should have a pretty good feel as to whether it's undue influence or incompetence or whatever. I mean, can it be both?*

[Horralls' attorney]: *I think there are cases that show both*. I'm not saying that it is, Your Honor, I'm just saying that's why we have alleged in both. We have three, I think.

The Court: *If the person was incompetent then undue influence would be irrelevant because they wouldn't understand it anyway, right?*

[Horralls' attorney]: *You are probably right about that.*

The Court: *Does that preclude you have to choose between one or the other?*

[3] Despite the talk of a pre-trial order, ultimately none was filed thereafter.

[Horralls' attorney]: *I don't think you are.*

[Appellees' attorney]: *I don't think you have to choose. I think it's all in there.*

March 1, 2007 Tr. at 18-22 (emphases added).

On the third day of trial, the following exchange transpired:

The Court: Again, in this case and I'm asking this of both counsel, there's been a lot of discussion of whose caring for whom and how but, again, what relevance does any of that have to the issue?

[Horralls' attorney]: It's background I agree, Judge –

The Court: You mean, it has something to do with what's going on with these families –

[Horralls' attorney]: Yes, I agree.

The Court: (Continuing) – I don't want this trial to last more than four days, and at the rate we are going I am afraid it may. I am going to have to start cutting some of this stuff off, because I don't know what it has to do with undue influence or competency. We seem to have these folks on trial as to who was a better caregiver, and I don't think that's a[t] issue at all. Now, correct me if I'm wrong.

[Horralls' attorney]: Well, I agree as to that issue I would agree that that's not the issue at all.

[Appellees' attorney]: Your Honor, my response to that would be that, I guess, having allowed [Horralls' attorney] to put that in issue, I feel I have to rebut.

The Court: Well, I understand that and I let him do some of that, but, maybe, I'm sorry I did that because it's taking time and I do think it was irrelevant.

[Appellees' attorney]: I did interpose the objection on relevancy with regard to the Edward Jones stuff. All right. I'll bear in mind what you are saying.

The Court: The question would be, how does the – if Mary Ellen or Jan and Dennis were the greatest caregivers in the world or the worst caregivers in the world, what difference does that make?

[Appellees' attorney]: I think, that's a question that you should ask the [Horralls] not me.

[Horralls' attorney]: I think*, if there's accusations that you improperly cared for somebody and you were sharing those accusations, I think there's more important accusations than that, Judge. The ones that get into the financial issue are more important than that. It's the totality of all of these accusations that we contend unduly influenced Yvonne to change her Trust on April 7th, when she executed that Trust Amendment. And, then, as indicated in the case law, undue influence is rarely ever provable by direct evidence. It is almost always indirect evidence. It's accumulative [sic]. It's done over a period of time* and things of that nature.

The Court: *Well, even assuming that's the case, how do you show that that influenced her?*

[Horralls' attorney]: *Well, the other line of cases that we brought – the other line of cases that were shared with you to the fact that we are convinced that there was a confidential relationship between [Appellees] and Yvonne, particularly, during the last fifteen days of her life. As a result of that confidential relationship, we believe that there is a presumption of undue influence and –*

The Court: *That applies in both situations.*

[Horralls' attorney]: *I understand what you are saying. And then the burden shifts to the other parties to prove by clear and unequivocal evidence that they did not unduly influence the decedent.*

[Horralls' attorney]: *Judge, I think it's important to note that there hasn't been any allegation of undue influence made by [Appellees]. In fact, really, the only allegation that they have made as to the January Trust was incompetence, and that was done through a denial of – it wasn't done through a counterclaim. And we have agreed to litigate just the incompetence issue, but there's never been any suggestion of undue influence as to [the Horralls].*

[Horralls' attorney]: *They never alleged that we were guilty of undue influence.*

The Court: *Does that mean, then, if the Court feels that there is some undue influence going on that I can't consider that?*

> [Horralls' attorney]: *Technically, I don't think that's – you know, no, I don't think that you are prohibited from doing that.*
>
> [Appellees' attorney]: *He's not prohibited.*
>
> [Horralls' attorney]: *No.*
>
> [Appellees' attorney]: *You could easily do it even if I move to amend the pleadings in that regard.* But let's get to the issue here.
>
> The Court: All right. Proceed.
>
> [Appellees' attorney]: Could I respond on what he's saying, because I want to know how to proceed here. We are getting very close to the end of his case, all right? I shouldn't characterize his evidence. *I think, what we've got here is, what he's saying is, he is creating some background evidence as he sees it of undue influence that we are going to argue requires a leap of faith for the Court to draw the conclusion that there was undue influence.*
>
> The Court: *You are entitled to go into that.*
>
> [Appellees' attorney]: *All right.*

Tr. at 494-97 (emphases added).

In light of the above discussions, the Horralls cannot say that Appellees' proposed findings and conclusions provided the Horralls with their first inkling that an undue influence challenge to the validity of the January 24, 2006 Amendment was being advanced. To the contrary, six months prior to trial, in discussing which theory Appellees might rely on to challenge the validity of the January 24, 2006 Amendment, the court stated that Appellees "can throw everything in but the kitchen sink[.]" March 1, 2007 Tr. at 19. Further, when one of Appellees' attorneys pointed to the Answer as implying that incapacity would be the theory advanced, the other lawyer for Appellees interjected, "Wait a minute," and indicated

that he did not want to be limited that way simply because duress, fraud, or undue influence had not been alleged originally. *Id*. at 21. Horralls' counsel did not object to leaving open possibilities other than incapacity. The court followed with, "And that goes both ways," to which both sides responded, "Right." *Id.* Thereafter, the court and counsel seemingly agreed that while discovery would likely narrow the issues, the parties would not be forced to choose one theory. *Id.* at 22.

For the sake of argument, we will assume that despite the March 2007 hearing, some uncertainty lingered as to whether undue influence pertaining to the January 24, 2006 Amendment could be an issue. Whatever confusion may have remained was surely cleared up at trial when the court stated that the argument that a confidential relationship leads to a presumption of undue influence "applies in both situations." Tr. at 496. At that point, the Horralls' attorneys attempted to limit the issues against which they would need to defend solely to those originally alleged in the Answer, i.e., competence at the time of the January 24, 2006 Amendment. The court immediately clarified otherwise. Specifically, the court asked, "Does that mean, then, if the Court feels that there is some undue influence going on that I can't consider that?" *Id*. Both the Horralls' and Appellees' lawyers agreed that the court would *not* be prohibited from considering undue influence. Thus, instead of objecting, let alone requesting time for additional discovery, the Horralls conceded that undue influence was an issue for both sides.

In sum, undue influence pertaining to the January 24, 2006 Amendment was not originally pled. However, as the case evolved and more information was gathered, the issue

arose. The possibility that it could be an issue was known as early as March 2007. Faced with the evidence in this case and the discussions before and during trial, the Horralls should not have waited until after receiving Appellees' proposed findings and conclusions to assert that undue influence regarding the January 24, 2006 Amendment was not at issue. Under these particular circumstances, the Horralls should not have been surprised. We cannot say the court erred in determining its decision to invalidate the January 24, 2006 Amendment based on the evidence presented. Although the case deviated a bit from its original course, the Horralls did not complain while en route and cannot now complain on appeal. *See Kirtley v. McClelland*, 562 N.E.2d 27, 32 (Ind. Ct. App. 1990) ("A failure to request the continuance under these circumstances has been held to constitute a waiver of the issue."), *trans. denied*.

II. April 7, 2006 Amendment

On cross-appeal, Appellees challenge the invalidation of the April 7, 2006 Amendment. They contend that Yvonne's "clear" intent was to make Cook a fifty percent general distributee. Appellee's Br. at 8, 12, 13. They argue that even if Cook was a person of "trust and confidence," this was not sufficient to create a presumption of undue influence. *Id.* at 8, 10. Further, they maintain that there was no finding that Cook had a fiduciary relationship. They cite a lack of evidence that Cook dealt unequally with Yvonne, had superior knowledge of the matter, or exercised overpowering influence over Yvonne. *Id.* at 11, 13. As for Mary Ellen, Appellees assert that even if a presumption of undue influence could apply, Mary Ellen received no new benefit during the relevant time period.

Relying on judicial estoppel, the Horralls assert that Appellees are making inconsistent claims. That is, according to the Horralls, Appellees cannot claim that the Horralls' caregiving role led to a presumption of undue influence, acknowledge that a caregiving position created the same presumption of undue influence regarding Mary Ellen, and yet deny that Cook's caregiving role produced a similar presumption. In addition, the Horralls contend that a presumption of undue influence may be found more easily when testamentary transfers, rather than inter vivos conveyances, are at issue.

We briefly address the judicial estoppel argument. Judicial estoppel seeks to prevent a litigant from asserting a position that is inconsistent with one asserted in the same or a previous proceeding. *Robson v. Texas E. Corp*., 833 N.E.2d 461, 466 (Ind. Ct. App. 2005), *trans. denied*. "Judicial estoppel is not intended to eliminate all inconsistencies; rather, it is designed to prevent litigants from playing 'fast and loose' with the courts. The primary purpose of judicial estoppel is not to protect litigants but to protect the integrity of the judiciary." *Id*. (citations omitted). The basic principle of judicial estoppel is that, absent a good explanation, a party should not be permitted to gain an advantage by litigating on one theory and then pursuing an incompatible theory in subsequent litigation. *Morgan County Hosp. v. Upham*, 884 N.E.2d 275, 280 (Ind. Ct. App. 2008), *trans. denied*. Judicial estoppel applies only to intentional misrepresentation, therefore, the dispositive issue supporting the application of judicial estoppel is the bad-faith intent of the litigant subject to estoppel. *Id*.

Judicial estoppel does not apply in the present case. Appellees are not attempting to use the same theory, presumption of undue influence, inconsistently. Although they do

advocate applying the presumption differently to the various parties, Appellees offer plausible distinctions to justify different applications of the presumption. For instance, they do not characterize the relationship between Cook and Yvonne as one of caregiver-patient; therefore, Appellees would not apply the presumption of undue influence. As mentioned *supra*, Appellees agree that a caregiver relationship was evidenced between Mary Ellen and Yvonne, and between the Horralls and Yvonne. However, according to Appellees, unlike the Horralls, Mary Ellen did not receive a gratuitous benefit via a trust amendment while acting as caregiver. Rather, Appellees characterize the increase in Mary Ellen's portion from $2,000 to $10,000 as a reflection of Mary Ellen's additional responsibilities under the April 7, 2006 Amendment. Whether we agree with this latter characterization, it does distinguish the situations sufficiently to clear a judicial estoppel hurdle.

Having concluded that judicial estoppel is not dispositive, we turn to the heart of the cross-appeal. That is, should the April 7, 2006 Amendment, which was invalidated by the probate court, be reinstated? In analyzing this issue, we review fiduciary relationships and undue influence. We also look at several relevant findings.

In Indiana, certain legal and domestic relationships raise a presumption of trust and confidence as to the subordinate party on the one side and a corresponding influence as to the dominant party on the other. *See Meyer v. Wright*, 854 N.E.2d 57, 60 (Ind. Ct. App. 2006), *trans. denied*. These relationships include attorney-client, guardian-ward, principal-agent, or, as here, a caregiver relationship. *Id.*; *see also Outlaw v. Danks*, 832 N.E.2d 1108, 1110 (Ind. Ct. App. 2005) (finding that a nephew who was his elderly, ailing aunt's sole caretaker had a

fiduciary relationship to her, which raised the presumption of undue influence), *trans. denied*. If such a relationship is established, and if a questioned transaction between those parties resulted in an advantage to the dominant party in whom the subordinate party had placed trust and confidence, the law imposes a presumption that the transaction was the result of undue influence exerted by the dominant party, constructively fraudulent, and thus void. *See Allender*, 833 N.E.2d at 534.

Undue influence has been defined as "the exercise of sufficient control over the person, the validity of whose act is brought into question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised." *Hamilton v. Hamilton*, 858 N.E.2d 1032, 1037 (Ind. Ct. App. 2006), *trans. denied*. "It is an intangible thing that only in the rarest instances is susceptible of what may be termed direct or positive proof." *Gast v. Hall*, 858 N.E.2d 154, 165 (Ind. Ct. App. 2006) (quoting *McCartney v. Rex*, 127 Ind. App. 702, 706, 145 N.E.2d 400, 402 (1957), as follows: "The difficulty is also enhanced by the fact universally recognized that he who seeks to use undue influence does so in privacy."), *trans. denied*. As such, undue influence may be proven by circumstantial evidence, and the only positive and direct proof required is of facts and circumstances from which undue influence may reasonably be inferred. *Gast*, 858 N.E.2d at 165. The dominant party may rebut a presumption of undue influence by establishing through clear and convincing evidence that she acted in good faith, did not take advantage of her position of trust, and that the transaction was fair and equitable. *In re Guardianship of*

Knepper, 856 N.E.2d 150, 154 (Ind. Ct. App. 2006), *clarified on reh'g*, 861 N.E.2d 717 (Ind. Ct. App. 2007), *trans. denied*.

The court made the following findings regarding the time frame leading up to April 7, 2006, and through April 15, 2006, the date of Yvonne's death:

> 35. On March 2, 2006, Nurse Chris Pettit's Hospice Notes indicate that Yvonne was *forgetful, lethargic and had short term memory loss*. The Plan of Care Notes for this visit indicate that *short term memory loss continues*.
>
> 36. On March 16, 2006, Nurse Chris Pettit's Hospice Notes indicate that Yvonne was *forgetful, confused and had short term memory loss*. The Plan of Care Notes indicate that Yvonne's *short term memory loss was increasing*.
>
> 37. On March 19, 2006, Nurse Chris Pettit's Hospice Notes indicate that Yvonne was *forgetful, confused, repeated her speech and had short term memory loss*.
>
> 38. On or about March 21, 2006, a cold, blustery day, [Cook and Motts] drove Yvonne to Yvonne's financial institutions to check on Yvonne's accounts. Yvonne was *on oxygen and was unable to leave the vehicle* during these visits.
>
> 39. On March 27, 2006, Hospice Notes indicate that Yvonne is *forgetful and suffers short term memory loss.*
>
> 40. On March 29, 2006, Hospice Nurse Kathy Sabados' notes indicate that Yvonne was *not able to remember* what exactly happened when she fell.
>
> 41. On March 30, 2006, Nurse Chris Pettit noted that Yvonne was *forgetful, lethargic, confused and had short term memory loss.* The Plan of Care Notes for this visit indicate that Yvonne's *short term memory loss was increasing.* Notes also indicate that Yvonne expressed a desire to "end it all with her gun."
>
> ….
>
> 43. Subsequent to March 31, 2006, Mary Ellen Skelton and [her sister,] Samantha Leslie, along with help from Hospice, became Yvonne's primary caregivers.

44. After March 31, 2006, [the Horralls], with the exception of one, isolated visit on April 12, 2006, were discouraged or prevented from seeing Yvonne by Mary Ellen Skelton and Samantha Leslie.

45. On April 1, 2006, Yvonne had to be readmitted to the Hospice care program due to her hospital visit on March 31, 2006. During her intake/readmission, Hospice Nurse Sharon Benfiet assessed the patient as *forgetful and confused*. The Hospice Nurse's Notes also indicate that Yvonne *repeated the same questions many times, was unable to retain information, was unable to set up her medications and forgot to take medications already set up*. In the Home Health Aide Care Plan, Nurse Benfiet indicates that Yvonne is *confused "most of the time."*

46. On April 4, 2006, Debbie Suranyi, Janus Horrall's sister, visited Yvonne and was told by Mary Ellen Skelton, in the presence of Yvonne, that the Horralls were doing things with Yvonne's money without her consent. Mary Ellen also told Debbie Suranyi, in the presence of Yvonne, that the Horralls had not taken good care of Yvonne and Dennis had humiliated Yvonne by stating Yvonne had "pissed all over her chair." *Mary Ellen repeated this statement many times and it upset Yvonne who felt degraded.* Mary Ellen also told Debbie Suranyi, in the presence of Yvonne, that [the Horralls] were over-medicating Yvonne.

47. On April 3, 2006, [Cook and Mary Ellen] drove Yvonne (who was still on oxygen) to Plymouth, Indiana to attorney Ken McDermott's office, to discuss changes to Yvonne's trust. At attorney McDermott's office, Yvonne, [Mary Ellen and Cook] met with Attorney McDermott and Terry Harris and expressed a desire to make a change, i.e., remove Janus as a remainder beneficiary and to replace her with [Cook], who has no relation to Yvonne. Subsequent to this meeting it was also expressed that Mary Ellen's specific distribution should be increased fivefold from $2,000.00 under the January 24, 2006 Second Amendment to $10,000.00. At the time of the meeting, *Yvonne's memory had deteriorated to the point that she was unable to recall signing the January 24, 2006 Trust Amendment and other related documents.*

48. On April 4, 2006, Yvonne received a phone call from Hospice Chaplain and Yvonne indicated that she was in pain. The Hospice Notes for the time in which Yvonne was being cared for by Mary Ellen [and her sister] and was being visited by [Cook] indicate that the Hospice nurses, and, in particular, Chris Pettit, had *serious concerns that Yvonne's caregivers were withholding pain medication from her contrary to her doctor's orders*.

49. On April 5, 2006, Doctor Michael Sheehan, a psychologist, visited Yvonne to assist her with coping with death. *Dr. Sheehan indicated that, due to her age and condition, Yvonne was susceptible to undue influence*.

50. Also on April 5, 2006, Becky Albrecht, sister of Janus Horrall, visited Yvonne while both Samantha Leslie and [Cook] were present. Yvonne indicated she was upset that Denny had told people Yvonne "pissed" in her chair. Becky attempted to tell Yvonne that Dennis would not talk in that way but Samantha Leslie *kept reiterating the purported statement and upsetting Yvonne further.*

51. On April 7, 2006, attorney Ken McDermott and his secretary, visited Yvonne and had her sign the Restatement of Trust which removed Janus as a one-half remainder beneficiary and replaced her with [Cook]. Attorney McDermott met with Yvonne in the presence of [Cook] and his secretary and Yvonne proceeded to execute the trust.

52. The Hospice Nurse's Note of Chris Pettit for April 10, 2006 assessed Yvonne as *forgetful, disoriented and confused and noted that she had short term memory loss and constantly repeated questions*.

53. The Hospice Nurse's Note of Karen Smith-Taljaard on April 10, 2006 indicates that Yvonne was threatening to shoot herself, as she had previously done. Yvonne was directed to turn her gun over to her neighbor.

54. The Hospice Nurse's Note of Sara Gillesby, R.N. for April 14, 2006 indicates that Yvonne was "very agitated" and "very paranoid" and "not taking pills because she is afraid family is trying to kill her."

….

61. Mary Ellen Skelton served as Yvonne's caretaker after April 1, 2006; acted for Yvonne by doing her banking and by paying her bills; accompanied Yvonne to Attorney McDermott's office in Plymouth, Indiana on April 4, 2006, and was present when changes to Yvonne's estate planning documents were discussed; and had the trust and confidence of Yvonne.

62. [Cook] assisted Yvonne in paying bills and writing checks; accompanied Yvonne to Attorney McDermott's office in Plymouth, Indiana, on April 3, 2006, and was present when changes to Yvonne's estate planning documents were discussed; was present on April 7, 2006, at Yvonne's home in Mishawaka, Indiana, when Yvonne signed the new estate planning documents

> (Power of Attorney, Designation of Health Care Representative, Power of Attorney Revocation, Restatement of the Revocable Living Trust of Mary Y. Skelton, last Will and Testament); and had the trust and confidence of Yvonne.
>
> 63. Both [Cook and Mary Ellen] benefitted from the April 7, 2006 Restatement in that [Cook] was given one half of Yvonne's remaining Trust Estate and Mary Ellen received a specific distribution of $10,000.00.
>
> ….
>
> 65. From March 31, 2006 until her death on April 15, 2006, Mary Ellen Skelton or Samantha Leslie spent every night with Yvonne.

App. at 13-16 (emphases added).

Although Appellees do not directly challenge the numerous findings that Yvonne was forgetful, confused, had memory loss, and was susceptible to undue influence, they fault the court for not referencing an adult protective services ("APS") investigation in its findings of fact. Appellees contend that APS was the "only impartial entity who actually observed Yvonne" during early April 2006, and that APS concluded that Yvonne was "of sound mind, very aware of her situation, and capable of making decisions." Appellees' Br. at 6, 7. We find this criticism of the findings unwarranted, as the APS investigation did not concern legal standards of capacity. Both APS investigators clearly testified that the purpose of their investigation was to ensure that Yvonne was being well cared for and not abused. Appellees' App. at 44, 52. In visiting Yvonne, the investigators were satisfied that her needs were being met and that she was receiving appropriate care. *Id.* at 36, 39. Whether she was being unduly influenced simply was not their focus.

Appellees do challenge one particular finding: Finding #63. They contend that per the April 7, 2006 Amendment, Mary Ellen would not be receiving a $10,000 bequest but

would be receiving a $2,000 bequest and an additional $8,000 only if she performed a variety of tasks. Appellees' Br. at 14-15. They describe the $8,000 as a "*de minimis*" exchange. *Id.* They also claim that Mary Ellen "did nothing to enhance any benefit to herself." *Id.*

The provision at issue, in the April 7, 2006 Amendment, is entitled, "Distribution – Specific Gifts." That provision contains a list of thirteen different persons, who, if alive at the time of Yvonne's death, were to receive either $2,000 or, in Mary Ellen's case, $10,000. App. at 42C. This was a clear $8,000 increase from the share Mary Ellen would have received under the January 24, 2006 Amendment. Granted, the following contingency was inserted in the April 7, 2006 Amendment: "If [Mary Ellen] is *unwilling* to serve as Co-Trustee, Co-Health Care Representative, Co-Executor of Will and/or Co-Power of Attorney, then her share shall be reduced from $10,000.00 to $2,000.00." *Id.* (emphasis added). However, this contingency did not absolutely require Mary Ellen to perform the additional tasks in order to receive the $10,000. Indeed, if she was merely *unable* to serve in these capacities, then the language within the contingency would not have precluded her from receiving the $10,000 specific gift. *Cf. id.* ("At [Yvonne's] death, the trustee shall distribute the Settlor's dog, … to [Motts.] However, if [Motts] is *unable or unwilling* to accept the dog, then to [Cook].") (emphasis added). In any event, this extra $8,000[4] opportunity did not exist for Mary Ellen in the January 24, 2006 Amendment. It arose very shortly after Mary Ellen became a caregiver for Yvonne, who was elderly, ailing, confused, suffering from

[4] Although $8,000 may not be a large percent of Yvonne's total estate, it is not an inconsequential, or *de minimis*, amount of money.

memory loss, and susceptible to undue influence. Mary Ellen clearly benefitted from the April 7, 2006 Amendment.

To recap, according to the unchallenged finding, during the week before Yvonne, in her home and in the presence of Mary Ellen and Cook, signed the last amendment, the following events transpired:

> Mary Ellen served as Yvonne's caretaker, doing her banking and paying her bills.
>
> Cook helped Yvonne with bill paying and check writing.
>
> Yvonne was readmitted to the Hospice care program and consistently described as elderly, ailing, confused, memory impaired, etc.
>
> The Horralls were prevented from seeing Yvonne.
>
> Mary Ellen stated, in front of Yvonne, that the Horralls mismanaged her money, overmedicated her, did not take good care of her, and humiliated her.
>
> Mary Ellen and Cook drove Yvonne (who was still on oxygen) to an attorney and were present during discussions about changing her trust.
>
> Hospice had serious concerns that Yvonne's caregivers were withholding pain medication.
>
> A doctor visited Yvonne and noted that due to her age and condition she was susceptible to undue influence.
>
> Humiliating statements allegedly made by the Horralls were reiterated to Yvonne, further upsetting her.

Eight days after signing the April 7, 2006 Amendment, Yvonne died. Given these facts, Appellees wisely do not challenge the fiduciary relationship that Mary Ellen and Yvonne had. This relationship, coupled with our conclusion that Mary Ellen did receive a benefit or advantage, leads to a presumption that the April 7, 2006 Amendment was the result of undue

influence. Without evidence to rebut that presumption, the April 7, 2006 Amendment is void. Accordingly, the court did not err in invalidating the April 7, 2006 Amendment. *See Allender*, 833 N.E.2d 529.

Having concluded that the court properly invalidated the April 7, 2006 Amendment due to the unrebutted presumption of undue influence of Mary Ellen, we need not dissect Cook's relationship to, or influence on, Yvonne. *See Carlson v. Warren*, 878 N.E.2d 844 (Ind. Ct. App. 2007) (summary judgment case contrasting confidential relationships as a matter of law and confidential relationships as a matter of fact). Regardless of Cook's relationship or influence, the invalidation of the April 7, 2006 Amendment affects her as well. The unrebutted presumption of undue influence by Mary Ellen muddies any attempt to discern Yvonne's "clear intent."

III. Attorneys' Fees

According to the Horralls, "[a]ll parties have filed a request for attorney's fees with the probate court," and the court "continued the hearing on the motions for attorney's fees indefinitely pending resolution of this appeal." Appellants' Br. at 23. On appeal, the Horralls now seek a remand for determination of fees, expenses, etc. Appellees concur in the request for remand for "further consideration of their request for reasonable attorneys' fees and expenses, including Appellate fees and expenses." Appellees' Reply Br. at 14. We grant the remand and trust that our resolution of this appeal will help the court expedite a decision on the parties' fee requests.

Affirmed and remanded.

ROBB, J., and BROWN, J., concur.